

1 SQUIRE, SANDERS & DEMPSEY L.L.P.  
Mark C. Goodman (Cal. State Bar No. 154692)  
2 David A. Gabianelli (Cal. State Bar No. 158170)  
Amy E. Rose (Cal. State Bar No. 222167)  
3 Andrew K. Chang (Cal. State Bar No. 222309)  
One Maritime Plaza, Suite 300  
4 San Francisco, CA 94111-3492  
Telephone: +1.415.954.0200  
5 Facsimile: +1.415.393.9887  
Email: mgoodman@ssd.com  
6 Email: dgabianelli@ssd.com  
Email: arose@ssd.com  
7 Email: achang@ssd.com

8 Attorneys for Defendant  
UNITED STATES FIRE INSURANCE COMPANY  
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10  
11 **IN THE UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
13 **(OAKLAND DIVISION)**  
14

15 LENSRAFTERS, INC.; and EYEXAM  
OF CALIFORNIA, INC.;

16 Plaintiffs,  
17

18 vs.

19 LIBERTY MUTUAL FIRE INSURANCE  
COMPANY; EXECUTIVE RISK  
20 SPECIALTY INSURANCE COMPANY;  
UNITED STATES FIRE INSURANCE  
21 COMPANY; MARKEL AMERICAN  
INSURANCE COMPANY; and  
22 WESTCHESTER FIRE INSURANCE  
COMPANY,

23 Defendants.  
24

Case No. C-07-2853 SBA  
The Honorable Sandra B. Armstrong

**E-FILING**

**UNITED STATES FIRE INSURANCE  
COMPANY'S ANSWER TO PLAINTIFFS'  
FIRST AMENDED COMPLAINT**

1 Defendant United States Fire Insurance Company ("U.S. Fire"), hereby answers the  
2 allegations of the First Amended Complaint ("FAC") in this action.

3 The numbered paragraphs below correspond to the paragraph numbers contained in  
4 Plaintiffs' FAC. The headings used match those chosen by Plaintiffs and are included for ease of  
5 reference only, and constitute no admission whatsoever.

## 6 INTRODUCTION

7 1. Answering Paragraph 1 of the FAC, U.S. Fire avers that to the extent Plaintiffs are  
8 asserting a legal opinion, no response is required. U.S. Fire lacks sufficient information to admit  
9 or deny the allegation that any Defendants other than U.S. Fire sold Plaintiffs any insurance  
10 policies, and on that basis denies that allegation. U.S. Fire admits that it entered into certain  
11 umbrella insurance contracts naming Plaintiffs as named insureds. Except as so expressly  
12 admitted, U.S. Fire denies the remaining allegations contained in Paragraph 1.

13 2. Answering Paragraph 2 of the FAC, U.S. Fire avers that to the extent Plaintiffs are  
14 asserting a legal opinion, no response is required. U.S. Fire admits that, in 2004, LensCrafters  
15 brought an action against Liberty Mutual Fire Insurance Company ("Liberty Mutual") and  
16 Executive Risk Specialty Insurance Company ("ERSIC") in the Northern District of California,  
17 Case No. C 04-1001 SBA (the "Prior Coverage Action") concerning insurance coverage for a  
18 lawsuit captioned *Melvin Gene Snow, et al. v. LensCrafters, Inc., et al.*, San Francisco Superior  
19 Court Case No. CGC-02-40554 (the "*Snow* Action"). U.S. Fire further admits that in the Prior  
20 Coverage Action, the Court held that Liberty Mutual and ERSIC had a duty to defend the *Snow*  
21 Action. Except as so expressly admitted, U.S. Fire denies the remaining allegations contained in  
22 Paragraph 2.

23 3. Answering Paragraph 3 of the FAC, U.S. Fire avers that to the extent Plaintiffs are  
24 asserting a legal opinion, no response is required. U.S. Fire lacks sufficient information to admit  
25 or deny the allegation that the parties in the *Snow* Action have reached a reasonable settlement  
26 contingent on approval and funding by the Defendants, and on that basis denies that allegation.  
27 U.S. Fire also lacks sufficient information to admit or deny the allegations concerning the conduct  
28 of any Defendant other than U.S. Fire, and on that basis denies the allegations. U.S. Fire admits

1 that Plaintiffs have requested that U.S. Fire accept a proposed settlement of the *Snow* Action.  
2 Except as so expressly admitted, U.S. Fire denies the remaining allegations contained in  
3 Paragraph 3. By Order entered February 12, 2008, this Court dismissed Plaintiffs' claims for  
4 breach of contract and breach of the implied covenant of good faith and fair dealing. As a result  
5 of this ruling, Plaintiffs' allegations in Paragraph 3 regarding any failure, refusal or breach by  
6 U.S. Fire are incorrect.

7 4. Answering Paragraph 4 of the FAC, U.S. Fire lacks sufficient information to admit  
8 or deny the allegations contained therein as against any other Defendants, and on that basis denies  
9 the allegations. U.S. Fire denies that any present controversy exist between LensCrafters' and  
10 U.S. Fire with respect to the duty to indemnify.

#### 11 THE PARTIES

12 5. Answering Paragraph 5 of the FAC, U.S. Fire lacks sufficient information to form  
13 a belief as to the truth of the allegations, and on that basis denies the allegations.

14 6. Answering Paragraph 6 of the FAC, U.S. Fire lacks sufficient information to admit  
15 or deny the allegations, and on that basis denies the allegations.

16 7. Answering Paragraph 7 of the FAC, U.S. Fire lacks sufficient information to admit  
17 or deny the allegations, and on that basis denies the allegations.

18 8. Answering Paragraph 8 of the FAC, U.S. Fire lacks sufficient information to admit  
19 or deny the allegations, and on that basis denies the allegations.

20 9. Answering Paragraph 9 of the FAC, U.S. Fire admits that it is incorporated under  
21 the laws of the state of Delaware and maintains its principal place of business in New Jersey.

22 10. Answering Paragraph 10 of the FAC, U.S. Fire lacks sufficient information to  
23 admit or deny the allegations, and on that basis denies the allegations.

24 11. Answering Paragraph 11 of the FAC, U.S. Fire lacks sufficient information to  
25 admit or deny the allegations, and on that basis denies the allegations.

#### 26 JURISDICTION

27 12. Answering Paragraph 12 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
28 are asserting a legal opinion, no response is required. U.S. Fire admits that jurisdiction is proper.

1 U.S. Fire lacks sufficient information to admit or deny the remaining allegations, and on that  
2 basis denies the allegations.

3 13. Answering Paragraph 13 of the FAC, U.S. Fire admits that venue is proper.  
4 Except as so expressly admitted, U.S. Fire denies the remaining allegations contained in  
5 Paragraph 13.

#### 6 **FACTUAL ALLEGATIONS**

7 14. Answering Paragraph 14 of the FAC, U.S. Fire lacks sufficient information to  
8 admit or deny the allegation that Defendants other than U.S. Fire issued insurance policies to  
9 Plaintiffs, and on that basis denies that allegation. U.S. Fire admits that it entered into certain  
10 umbrella insurance contracts naming Plaintiffs as named insureds. Except as so expressly  
11 admitted, U.S. Fire denies the remaining allegations contained in Paragraph 14.

12 15. Answering Paragraph 15 of the FAC, U.S. Fire lacks sufficient information to  
13 admit or deny the allegation that Plaintiffs have complied with all terms and conditions precedent  
14 in Plaintiffs' insurance contracts with Defendants other than U.S. Fire, and on that basis denies  
15 the allegations. U.S. Fire denies that Plaintiffs have complied with all terms and conditions in  
16 Plaintiffs' insurance contracts with U.S. Fire.

#### 17 **The Liberty Mutual Policies**

18 16. Answering Paragraph 16 of the FAC, U.S. Fire lacks sufficient information to  
19 admit or deny the allegations, and on that basis denies the allegations.

20 17. Answering Paragraph 17 of the FAC, U.S. Fire lacks sufficient information to  
21 admit or deny the allegations, and on that basis denies the allegations.

#### 22 **The ERSIC Policy**

23 18. Answering Paragraph 18 of the FAC, U.S. Fire lacks sufficient information to  
24 admit or deny the allegations, and on that basis denies the allegations.

25 19. Answering Paragraph 19 of the FAC, U.S. Fire lacks sufficient information to  
26 admit or deny the allegations, and on that basis denies the allegations.

#### 27 **The U.S. Fire Policies**

28 20. Answering Paragraph 20 of the FAC, U.S. Fire admits the allegations contained

1 therein.

2 21. Answering Paragraph 21 of the FAC, U.S. Fire admits that insurance policies at  
3 issue contain, among other provisions, the specific provisions quoted in Paragraph 21. Except as  
4 so expressly admitted, U.S. Fire denies the allegations.

5 **The Markel Policy**

6 22. Answering Paragraph 22 of the FAC, U.S. Fire lacks sufficient information to  
7 admit or deny the allegations, and on that basis denies the allegations.

8 23. Answering Paragraph 23 of the FAC, U.S. Fire lacks sufficient information to  
9 admit or deny the allegations, and on that basis denies the allegations.

10 **The Westchester Policies**

11 24. Answering Paragraph 24 of the FAC, U.S. Fire lacks sufficient information to  
12 admit or deny the allegations, and on that basis denies the allegations.

13 25. Answering Paragraph 25 of the FAC, U.S. Fire lacks sufficient information to  
14 admit or deny the allegations, and on that basis denies the allegations.

15 26. Answering Paragraph 26 of the FAC, U.S. Fire lacks sufficient information to  
16 admit or deny the allegations, and on that basis denies the allegations.

17 **Defense and Settlement of the *Snow* Action**

18 27. Answering Paragraph 27 of the FAC, U.S. Fire admits the allegations contained  
19 therein.

20 28. Answering Paragraph 28 of the FAC, U.S. Fire admits that the Second Amended  
21 Complaint filed in the *Snow* Action ("SAC") asserts a claim under the Confidentiality of Medical  
22 Information Act, Cal. Civ. Code §56, *et seq.* based on allegations that Plaintiffs obtained and  
23 disclosed confidential medical information in violation thereof. U.S. Fire lacks sufficient  
24 information to admit or deny the allegations regarding any other Defendant's insurance policies,  
25 and on that basis denies the allegations. Except as so expressly admitted and answered, U.S. Fire  
26 denies the remaining allegations contained in Paragraph 28.

27 29. Answering Paragraph 29 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
28 are asserting a legal opinion, no response is required. U.S. Fire lacks sufficient information to

1 admit or deny the allegations contained in Paragraph 29.

2 30. Answering Paragraph 30 of the FAC, U.S. Fire admits the allegations contained  
3 therein.

4 31. Answering Paragraph 31 of the FAC, U.S. Fire admits that on June 20, 2005,  
5 during the Prior Coverage Action, this Court held that the SAC in the *Snow* Action alleges  
6 “publication of material that violates a person’s right of privacy” and that both Liberty Mutual  
7 and ERSIC had a duty to defend Plaintiffs in the *Snow* Action. Except as so expressly admitted,  
8 U.S. Fire denies the remaining allegations contained in Paragraph 31.

9 32. Answering Paragraph 32 of the FAC, U.S. Fire admits that based on the stipulation  
10 of Plaintiffs, Liberty Mutual, and ERSIC, this Court dismissed without prejudice Plaintiffs’  
11 claims for indemnity in the Prior Coverage Action on the grounds that such claims were not ripe  
12 for adjudication and that any new action brought by the parties to that stipulation should be  
13 brought exclusively in the United States District Court for the Northern District of California.  
14 Except as so expressly admitted, U.S. Fire denies the remaining allegations contained in  
15 Paragraph 32.

16 33. Answering Paragraph 33 of the FAC, U.S. Fire admits that on November 22, 2005,  
17 this Court entered an Amended Judgment in the First Coverage Action, from which Liberty  
18 Mutual appealed. Except as so expressly admitted, U.S. Fire denies the remaining allegations  
19 contained in Paragraph 33.

20 34. Answering Paragraph 34 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
21 are asserting a legal opinion, no response is required. U.S. Fire lacks sufficient information to  
22 admit or deny the allegations, and on that basis denies the allegations.

23 35. Answering Paragraph 35 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
24 are asserting a legal opinion, no response is required. U.S. Fire admits that it did not attend a  
25 mediation in the *Snow* Action on July 26, 2007. U.S. Fire lacks sufficient information to admit or  
26 deny the remaining allegations, and on that basis denies the allegations.

27 36. Answering Paragraph 36 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
28 are asserting a legal opinion, no response is required. U.S. Fire lacks sufficient information to

1 admit or deny the allegations, and on that basis denies the allegations.

2 37. Answering Paragraph 37 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
3 are asserting a legal opinion, no response is required. U.S. Fire lacks sufficient information to  
4 admit or deny the allegations regarding the conduct of Defendants other than U.S. Fire, and on  
5 that basis denies the allegations. U.S. Fire admits that it has raised defenses to coverage of the  
6 underlying *Snow* Action. Except as so expressly admitted, U.S. Fire denies the remaining  
7 allegations contained in Paragraph 37. By Order entered February 12, 2008, this Court dismissed  
8 Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair  
9 dealing. As a result of this ruling, Plaintiffs' allegations in Paragraph 37 that U.S. Fire breached  
10 or refused an obligation to Plaintiffs is incorrect, as is the allegation that such breach or refusal  
11 prevented the settlement of *Snow* Action because no such breach or refusal has taken place.

12 38. Answering Paragraph 38 of the FAC, U.S. Fire denies the allegations contained  
13 therein. By Order entered February 12, 2008, this Court dismissed Plaintiffs' claims for breach of  
14 contract and breach of the implied covenant of good faith and fair dealing. As a result of this  
15 ruling, Plaintiffs' allegations in Paragraph 38 were found to be incorrect.

16 **FIRST CLAIM FOR RELIEF:**  
17 **DECLARATORY JUDGMENT RE**  
**DEFENDANTS' DUTY TO INDEMNIFY**

18 39. Answering Paragraph 39 of the FAC, U.S. Fire incorporates its answers to  
19 Paragraphs 1 through 38.

20 40. Answering Paragraph 40 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
21 are asserting a legal opinion, no response is required. To the extent any response is required, U.S.  
22 Fire denies the allegations contained in Paragraph 40.

23 41. Answering Paragraph 41 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
24 are asserting a legal opinion, no response is required. To the extent any response is required, U.S.  
25 Fire denies the allegations contained in Paragraph 41.

26 42. Answering Paragraph 42 of the FAC, U.S. Fire avers that to the extent Plaintiffs  
27 are asserting a legal opinion, no response is required. To the extent any response is required, U.S.  
28 Fire denies the allegations contained in Paragraph 42.



**SECOND CLAIM FOR RELIEF:  
BREACH OF CONTRACT RE DEFENDANTS'  
DUTY TO INDEMNIFY AND DUTY TO SETTLE**

No response is required to the allegations contained in Paragraphs 43 through 45 of the FAC because the Second Claim for Relief has been dismissed by Order of this Court entered February 12, 2008.

**THIRD CLAIM FOR RELIEF:  
TORTIOUS BREACH OF THE COVENANT  
OF GOOD FAITH AND FAIR DEALING AGAINST  
DEFENDANTS U.S. FIRE, MARKEL AND WESTCHESTER**

No response is required to the allegations contained in Paragraphs 46 through 53 of the FAC because the Third Claim for Relief has been dismissed by Order of this Court entered February 12, 2008 .

**AFFIRMATIVE DEFENSES**

U.S. Fire sets forth below its affirmative defenses. Each defense is asserted as to all causes of action against U.S. Fire. By setting forth these affirmative defenses, U.S. Fire does not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiffs. Moreover, nothing stated herein is intended or shall be construed as an acknowledgement that any particular issue or subject necessarily is relevant to Plaintiffs' allegations.

**FIRST AFFIRMATIVE DEFENSE**

The FAC and each claim for relief alleged therein, fails to state facts sufficient to constitute a claim for relief against U.S. Fire.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, by the doctrine of waiver.



**FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred, in whole or in part, by the doctrines of equitable estoppel and/or quasi-estoppel.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs are not entitled to the relief to the extent Plaintiffs failed to perform and/or satisfy any condition precedent under the insurance contracts at issue.

**SEVENTH AFFIRMATIVE DEFENSE**

To the extent that Plaintiffs had notice of the conditions, events or injuries alleged in the *Snow* Action and failed to give timely notice to the Defendants, Plaintiffs' claim for relief is barred.

**EIGHTH AFFIRMATIVE DEFENSE**

To the extent that Plaintiffs negligently or intentionally failed to disclose, concealed or misrepresented facts concerning the risks undertaken by the Defendants, Plaintiffs claim is barred, the insurance issued by Defendants is null and void and the Defendants may, but need not formally, rescind the policies.

**NINTH AFFIRMATIVE DEFENSE**

Any obligation of the Defendants to perform under their policies is excused by Plaintiffs' breach of any obligation owed under the policies at issue, including but not limited to Plaintiffs breach of and/or failure to perform their duty to cooperate.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claim is barred in whole or in part by the terms, exclusions, conditions and limitations contained in the insurance contracts between the Defendants and the Plaintiffs.

**ELEVENTH AFFIRMATIVE DEFENSE**

To the extent the insurance contracts at issue are subject to various limitations, including, but not limited to, deductibles, retentions, the "retained limit", retrospective rating plans or deductions, U.S. Fire's liability to Plaintiffs, if any, is thereby restricted or off-set.

**TWELFTH AFFIRMATIVE DEFENSE**

To the extent that any primary or other underlying insurance has not exhausted, U.S. Fire

owes no obligation to Plaintiffs.

**THIRTEENTH AFFIRMATIVE DEFENSE**

To the extent that Plaintiffs have failed to mitigate any financial liability caused to them, their claim is barred.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs claim is barred to the extent no covered "personal injury" or "occurrence" has taken place during any insurance policy period at issue.

**FIFTEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiffs have incurred no fortuitous loss, their claim is barred.

**SIXTEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiffs acted intentionally, Plaintiffs' claim is barred.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiffs expected or intended injury, their claim is barred.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

To the extent there are no "damages" as defined by the insurance contracts at issue, Plaintiffs claim is barred.

**NINETEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiffs incur liability as the result of any criminal act, coverage is barred.

**TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiffs' claim is barred to the extent it seeks insurance coverage for penalties or fines.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

To the extent Plaintiffs did not seek U.S. Fire consent with respect to any settlements for which Plaintiffs seek coverage, their claims are barred.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

To the extent Plaintiffs seek relief with respect to monies that Plaintiffs are not legally obligated to pay as damages, Plaintiffs claims are barred.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

To the extent that Plaintiffs seek coverage for voluntary payments, Plaintiffs' claim is

1 barred.

2 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

3 To the extent that Plaintiff have not satisfied the maintenance of underlying insurance  
4 provisions in the policies, Plaintiffs' claim is barred.

5 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

6 Plaintiffs claims are barred by the professional liability limitation contained the insurance  
7 contracts at issue.

8 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

9 To the extent Plaintiffs seek relief with respect to punitive damages, their claim is barred.

10 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

11 Any allocation of defense or indemnity costs among Plaintiffs, their other insurers and  
12 U.S. Fire are governed by principles of equity and the specific language of Plaintiffs' insurance  
13 policies. To the extent Plaintiffs' other carriers have paid less than their fair share of insurance  
14 benefits to Plaintiffs in comparison with U.S. Fire and/or less than contractually obligated to pay,  
15 Plaintiffs cannot recover from U.S. Fire.

16 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

17 U.S. Fire hereby gives notice that it intends to rely upon any other defense that may  
18 become available or appear during the discovery proceedings in this case and hereby reserves the  
19 right to amend its Answer to assert any such defenses.

20 WHEREFORE, U.S. Fire pray for judgment as follows:

- 21 1. That Plaintiffs take nothing;  
22 2. That judgment be entered in favor of U.S. Fire;  
23 3. For costs of suit incurred herein; and  
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1           4.       For such other and further relief as this Court deems just and proper.  
2

3       Dated: March 3, 2008

SQUIRE, SANDERS & DEMPSEY L.L.P.

4  
5       By: David A. Gabianelli  
6                               David A. Gabianelli  
7       Attorneys for Defendant  
8       UNITED STATES FIRE INSURANCE COMPANY  
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**PROOF OF SERVICE**

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is One Maritime Plaza, Third Floor, San Francisco, California 94111-3492.

On March 3, 2008, I served the following document described as:

**U.S. FIRE INSURANCE COMPANY'S REPLY BRIEF IN  
SUPPORT OF MOTION TO DISMISS LENSCHRAFTERS' SECOND  
AND THIRD CAUSES OF ACTION**



VIA THE UNITED STATES DISTRICT COURT ELECTRONIC FILING SERVICE on interested parties in this action as set forth below:

Richard DeNatale, Esq.  
Celia M. Jackson, Esq.  
Heller, Ehrman LLP  
333 Bush Street  
San Francisco, CA 94104-2878  
Telephone: (415) 772-6000  
Facsimile: (415) 772-6268  
[richard.denatale@hellerehrman.com](mailto:richard.denatale@hellerehrman.com)  
[celia.jackson@hellerehrman.com](mailto:celia.jackson@hellerehrman.com)

Terrence R. McInnis, Esq.  
Ross, Dixon & Bell, LLP  
5 Park Plaza, Suite 1200  
Irvine, CA 92614  
Telephone: (949) 622-2700  
Facsimile: (949) 622-2739  
[tmcinnis@rdbl.com](mailto:tmcinnis@rdbl.com)

Robert D. Dennison, Esq.  
Harris, Green & Dennison  
5959 W. Century Blvd., Suite 1100  
Los Angeles, CA 90045  
Telephone: (310) 665-8656  
Facsimile: (310) 665-8659  
[rdd@h-glaw.net](mailto:rdd@h-glaw.net)

Alex F. Stuart, Esq.  
Willoughby, Stuart & Bening  
Fairmont Plaza  
50 West San Fernando, Suite 400  
San Jose, CA 95113  
Telephone: (408) 289-1972  
Facsimile: (408) 295-6375  
[afs@wsblaw.net](mailto:afs@wsblaw.net)

Chip Cox, Esq.  
Long & Levitt  
465 California Street, 5th Floor  
San Francisco, CA 94104  
Telephone: (415) 438-4413  
Facsimile: (415) 397-6392  
[chipc@longlevit.com](mailto:chipc@longlevit.com)

Executed on March 3, 2008, at San Francisco, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Lanii Langlois

Lanii Langlois